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No. 92-217

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN COUNCIL OF THE BLIND OF COLORADO, INC., a Colorado non-profit corporation; ROCKY MOUNTAIN FEDERATION OF HANDICAPPED ATHLETES, a division of Pegasus Foundation, Inc., a Colorado non-profit corporation,

Petitioners,

v.

ROY ROMER, Governor, State of Colorado; DUANE WOODARD, Attorney General, State of Colorado; NORM S. EARLY, JR., District Attorney for the Second Judicial District, State of Colorado,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. *DE MINIMIS* TEST

The respondents concede that "particular lines may eventually have to be drawn with regard to the meaning of 'technical or *de minimis*' for purposes of a plaintiff's fee award . . . ." Br. Opp. 5 (quoting *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792 (1989)). They recognize, in other words, the significance of the issue underlying the first question presented by the petition.

The respondents go on to assert, however, that "it would be inappropriate and unnecessary" to consider the issue "in a case in which the petitioners have failed to achieve anything that is even legally required, such that they could pass the catalytic effect test." Br. Opp. 5. The posited reason is unfounded, and does not obstruct review.

First, the court below expressly refrained from ruling on the "required by law" element. *See* Pet. App. 9a, 962 F.2d 1501, 1505. Indeed, the court treated each of the statutory changes under the *Garland* "de minimis" rubric, with the exception of one, which it held to be "directly caused and mandated by the *Riley* case," Pet. App. 10a-12a, 962 F.2d at 1506-07 (citing *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988))—in other words, that it *was* "legally required."

In any event, the phrase "required by law" is a term of art with particular meaning in the section 1988 context—a meaning concededly satisfied in this case. A defendant's conduct is "required by law" if it is " 'not a wholly gratuitous response to an action that in itself was frivolous or groundless.' " *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1475 (10th Cir. 1985) (quoting *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1982)); *accord*, *Collins v. Romer*, 962 F.2d 1508, 1513-14 (10th Cir. 1992).[1] The respondents conceded in the dis-

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[1] The leading case, relied upon in *Garland* on another point, is *Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978), under which the test is whether the action "could be considered 'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so,' " *id.* at 281. It could not be otherwise, since "[n]othing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the merits or on a judicial declaration that the plaintiffs' rights have been violated." *Maher v. Gagne*, 448 U.S. 122, 129 (1980). To require litigation of the merits of a mooted case on a motion for attorney's fees would turn that motion into just the "second major litigation" it ought not be. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). *See also, e.g.*, *Koster v. Perales*, 903 F.2d 131, 136 (2d Cir. 1990); *Ortiz de Arroyo v.*

trict court that the action met this test, that it was in no way "frivolous." Knaizer Depo. 55.

The petition, therefore, squarely poses the significant issue of the application of the "de minimis" test—an aspect of which is now under review in *Farrar v. Hobby*, No. 91-990 (U.S. argued Oct. 7, 1992)—in the context of an equitable action mooted by the defendants' unilateral conduct. Review is especially called for here, where the mooting event was the enactment of amendments that specifically addressed each of the several statutory provisions that the petitioners had challenged.

II. *BURDEN OF PROOF*

Respondents' dismissal of the disharmony of the opinion below with decisions of other circuits on the question of burden of proof is unsupported. Here as well, the respondents do not contend that the issue is not important, but assert instead that the First and Second Circuit cases cited in the petition embody no proposition of law, that petitioners did not raise the issue below, and that it is irrelevant to this case. *See* Br. Opp. 6. None of these positions survives inspection.

The respondents say first that the "two cases cited in the petition . . . purport only to give particular instructions on remand for resolution of the questions raised in particular factual contexts." Br. Opp. 6. All legal issues, of course, arise "in particular factual contexts." Here, the "instructions . . . for resolution of questions" are nothing more or less than rules of law. Thus: "*Where, as here*, plaintiffs' lawsuit is mooted by corrective action, the burden properly shifts to defendants to establish the absence of a causal connection in order to defeat a claim for legal fees." *Koppel v. Wien*, 743 F.2d 129, 135 (2d

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Romero Barcelo, 765 F.2d 275, 283 (1st Cir. 1985); *Illinois Welfare Rights Org. v. Miller*, 723 F.2d 564, 566 (7th Cir. 1983); *Miller v. Staats*, 706 F.2d 336, 441 n.31 (D.C. Cir. 1983).

Cir. 1984) (emphasis added). And: Unless the government can "demonstrate[] . . . in a concrete manner" that "the complainant's success in obtaining the documents was due more to its responsible compliance with the provisions of the Act than to the complainant's pending suit," then "*a court would have to conclude* that the complainant had 'substantially prevailed' within the meaning of [FOIA]." *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 919 (1st Cir. 1980) (emphasis added).

Next, it is claimed that "the petitioners never raised any question about the test for establishing a catalytic effect below." Br Opp. 6. On the contrary, petitioners raised this same point, citing the same cases, in both the district court, *see* 2 Applt. App. 287 n.3,[2] and the court of appeals, *see* Applt. Br. 24 n.11.[3]

Finally, the respondents say that the allocation of the burden made no difference. *See* Br. Opp. 6. The point cannot be credited in light of the overwhelming prima facie case of causation the petitioners made, including the statutory changes tailored to petitioners' complaint and the explicit statements in the legislative history. *See* Pet. 10-17. The "other lawsuits" and "other parties" referred to by the respondents concerned different sets of issues, and the fact that the petitioners assertedly had "caselaw" supporting them, *see* Br. Opp. 6, hardly discounts petitioners as the prevailing parties. There is no reason to suspect, in sum, that the allocation of the burden would not have affected the outcome.

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[2] "Applt. App." refers to the two-volume Appellants' Appendix filed in the court of appeals.

[3] "Applt. Br." refers to the Brief of the Appellants filed in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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